

COMMONWEALTH OF MASSACHUSETTS

**DEPARTMENT OF
INDUSTRIAL ACCIDENTS**

BOARD NO. 05208-79

William H. Gilrein (Deceased)	Employee
Jane Gilrein (as Widow and Executrix of employee's estate)	Claimant
City of Worcester Parks & Recreation	Employer
City of Worcester	Self-insurer

REVIEWING BOARD DECISION

(Judges Carroll, McCarthy & Maze-Rothstein)

APPEARANCES

William M. LeDoux, Esq., for the claimant
Lisa M. Carmody, Esq., for the self-insurer

CARROLL, J. The parties cross-appeal a decision in which an administrative judge awarded retroactive partial incapacity benefits to the claimant widow on behalf of the deceased employee for an April 13, 1979 industrial injury. The claimant argues, among other things, that she is entitled to a § 7(2) penalty for the self-insurer's failure to accept or deny the claim in a timely fashion. In its appeal, the self-insurer argues that the claimant's § 35 claim was barred by the equitable defense of laches. Both of these issues were raised at the hearing, but the administrative judge failed to address either of them. (Dec. 3.) We conclude that no penalty was due under § 7(2), and that the judge's omission to address it was harmless error. Regarding the self-insurer's argument on laches, we consider it appropriate to recommit the case for further findings.

The employee, William Gilrein, suffered a work-related myocardial infarction on April 13, 1979, while raking leaves into a truck in the course of his job as a general maintenance worker for the Worcester Parks Department. (Dec. 5.) The self-insurer paid § 34 benefits from the date of injury until November 20, 1979. (Dec. 4.) The employee died as a result of cardiac arrest and arteriosclerotic disease on February 24, 2001. (Dec. 5.)

William H. Gilrein (Deceased)
Board No. 05208-79

The employee treated with Dr. Murphy, an internist and primary care physician for the employee, since 1990. Dr. Murphy opined that the employee had been disabled from all sustained physical activity and died as a result of his work-related heart condition. Dr. Murphy certified the employee to work as an approved child care assistant in 1995 and 1997. (Dec. 6.) Dr. Lyons, the employee's cardiologist, concurred with Dr. Murphy's opinions on causal relationship and disability. (Dec. 7.) Mr. Gilrein worked part-time for his wife as a child day care assistant from 1995 until his death. (Dec. 9.)

In July 2000, the employee filed a claim for § 34 benefits from December 1, 1979 to June 30, 1985 and for § 34A thereafter. Just two (2) days before conference the employee died and his widow was allowed to join a claim for § 31, widows benefits. All claims were denied at conference. At hearing, the employee's widow/executrix ("claimant") sought § 31 death benefits, § 33 burial benefits, and indemnity benefits under §§ 34 and 34A from December 1, 1979 until the employee's death on February 24, 2001. (Dec. 3, 8; February 11, 2002) The judge concluded that the employee had been partially incapacitated from the time he left work with the City of Worcester due to his 1979 work injury until his death in 2001, with a minimal earning capacity of \$56.00 per week. (Dec. 10.) As a result, the judge awarded § 35 benefits based on the employee's average weekly wage of \$207.60, and the \$56.00 weekly earning capacity, from December 1, 1979 to February 24, 2001, or until the statutory maximum was reached. (Dec. 11.) The judge noted that the self-insurer had agreed to pay the claimant's death benefits. (Dec. 8.)

The claimant asserts on appeal that the judge erred by failing to award her penalties under § 7(2) for the self-insurer's failure to abide by the provisions of § 7(1) in its initial handling of the 2001 claim for benefits. General Laws c. 152, § 7(1), requires an insurer to pay or deny an initial claim for workers' compensation benefits within fourteen days of notification of an alleged work injury, and § 7(2) sets out a schedule of penalties for failure to comply with the § 7(1) requirements. While we agree that the judge should have made findings on this issue, the error of omission is harmless, because no penalty was due on the widow's claim for *further* indemnity benefits. Section 7

William H. Gilrein (Deceased)

Board No. 05208-79

penalties are only triggered by an insurer's mishandling of the payment or denial of an *initial* claim. Here, the self-insurer had accepted the 1979 industrial injury and paid § 34 benefits for several months. (Dec. 4.) No further § 7 requirements needed to be met after that initial action. See Saracino v. Commonwealth of Massachusetts Trial Court Dept., 8 Mass. Workers' Comp. Rep. 422, 424-425 (1994).

The self-insurer complains on appeal that the judge erred by failing to address and apply the equitable doctrine of laches to the claim for indemnity benefits, which was made in 2000 for a retroactive period of alleged disability dating back to 1979. The self-insurer's argument gives us pause.

The equitable defense of laches can apply, where appropriate, in workers' compensation proceedings. See, e.g., McElhinney v. M.B.T.A., 9 Mass. Workers' Comp. Rep. 349, 353 (1995); Goulet v. APA Transportation Corp., 8 Mass. Workers' Comp. Rep. 338, 339 (1994); Evans v. Trubilt Truck Co., 5 Mass. Workers' Comp. Rep. 271 (1991). "A judge may find as a fact that laches exists if there has been unjustified, unreasonable, and prejudicial delay in raising a claim." Srebnick v. Lo-Law Transit Mgt., Inc., 29 Mass. App. Ct. 45, 49 (1990). The burden rests with the party asserting the defense. McGrath v. C.T. Sherer Co., 291 Mass. 35, 59-60 (1935).

In the present case, the self-insurer raised laches as a defense at hearing. (Dec. 3.) The judge did not address this disputed issue, as he was obliged to do under § 11B. Therefore, recommitment is appropriate for the judge to make further findings as to whether laches should apply to bar this claim for weekly benefits.

Accordingly, the decision is recommitment for that purpose only and affirmed in all other respects.

So ordered.

Martine Carroll
Administrative Law Judge

William H. Gilrein (Deceased)
Board No. 05208-79

Filed: **January 26, 2004**

William A. McCarthy
Administrative Law Judge

Susan Maze-Rothstein
Administrative Law Judge